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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

In re S.J., a Person Coming  
Under the Juvenile Court Law.

B291242

(Los Angeles County  
Super. Ct. No. CK86980A)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

TAMARA J.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of  
Los Angeles County, Martha Matthews, Judge. Affirmed.

Jack A. Love, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,  
Assistant County Counsel, Brian Mahler, Deputy County  
Counsel, for Plaintiff and Respondent.

Following the juvenile court's termination of reunification services and setting of a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26,<sup>1</sup> Tamara J., the mother of 10-year-old S.J., petitioned to reinstate reunification services under section 388, arguing her participation in individual therapy had resulted in improved emotional stability. The court denied the petition. On appeal Tamara contends the court erred in finding she had failed to carry her burden to show changed circumstances and that reinstatement of services was in S.J.'s best interests. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Prior Dependency Proceedings*

In March 2016 the juvenile court sustained an amended section 300 petition finding Tamara had a history of domestic violence and had failed to take the medication prescribed for her diagnosed bipolar disorder, placing S.J. at substantial risk of serious physical harm. At the July 2016 disposition hearing the court declared S.J. a dependent child of the court, removed her from Tamara's custody and ordered family reunification services and unmonitored visitation for Tamara. The court also ordered Tamara to participate in parenting classes, a domestic violence support group, individual counseling and psychiatric care and to take her prescribed psychotropic medication.

Over the next year Tamara appeared at the statutorily mandated permanency planning review hearings. (§§ 366.21, subds. (e), (f), 366.22.) At the combined six- and 12-month review hearing the court found the conditions that justified the court's

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<sup>1</sup> Statutory references are to this code.

jurisdiction had not been resolved and that return of S.J. to Tamara's custody would create a substantial risk of detriment to S.J.'s safety, protection and well-being. Although Tamara had completed many court-ordered programs and had made significant progress, the court agreed with the Los Angeles County Department of Children and Family Services (Department) and S.J.'s counsel that Tamara's ongoing emotional instability, combined with S.J.'s special needs,<sup>2</sup> created a substantial risk of harm to S.J. if she were returned to Tamara's custody at that time. The court ordered additional reunification services to give Tamara more time to apply the skills she had learned in her programs with the goal of returning S.J. to Tamara's custody. We affirmed the juvenile court's finding as supported by substantial evidence. (*In re S.J.* (Sept. 17, 2018, B285770) [nonpub. opn.]<sup>3</sup>)

In its September 26, 2017 report for the 18-month review hearing, the Department initially recommended S.J. be returned to Tamara's custody. However, it withdrew that recommendation in October 2017 after Tamara became increasingly erratic and unstable during an extended visit with S.J. Tamara falsely

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<sup>2</sup> S.J. has been diagnosed with chromosomal deletion syndrome, learning disabilities, moderate intellectual disability and history of seizures.

<sup>3</sup> We also found the juvenile court and the Department had failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We conditionally affirmed the court's order at the 12-month review hearing and remanded the matter for the court and the Department to remedy that ICWA violation. (*In re S.J.*, *supra*, B285770, pp. 20-24, 27.)

accused S.J.'s father of assault and enveloped S.J. in a scheme to lie to social workers and the court in support of Tamara's false application for a restraining order. Tamara also stopped taking her prescribed medication for bipolar disorder and appearing at scheduled therapy appointments. In October 2017 Tamara was involuntarily hospitalized on a 72-hour psychiatric hold.

Although Tamara resumed therapy in November 2017 and became medication compliant following her discharge from the hospital, at the December 2017 18-month review hearing the court found Tamara's renewed efforts too recent and her emotionality too unstable to ensure S.J.'s safety if she were returned to Tamara's custody. Finding that Tamara had been provided with reasonable services and had been unable to fully appreciate and adequately address the domestic violence and mental health problems that had led to the assumption of dependency jurisdiction, the court terminated reunification services, ordered monitored visitation for Tamara and set a selection and implementation hearing for April 5, 2018.<sup>4</sup>

We denied on the merits Tamara's petition for extraordinary writ challenging the court's order setting the selection and implementation hearing. (See *Tamara J. v. Superior Court* (Sept. 17, 2018, B286979) [nonpub. opn.] )

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<sup>4</sup> That hearing, originally scheduled for April 5, 2018, has been continued several times and is currently scheduled for March 11, 2019.

2. *Tamara's Section 388 Petition for a Home-of-parent Order or Reinstatement of Reunification Services*

a. *Tamara's section 388 petition*

On April 3, 2018 Tamara petitioned pursuant to section 388 for a change in the court's order terminating reunification services. Tamara asserted she had consistently participated in mental health services since October 2017 and argued it was in S.J.'s best interests to be returned to her custody with a home-of-parent order. She alternatively requested reinstatement of reunification services and unmonitored visitation. Tamara included a letter from her licensed family therapist, Jennifer Sindell, stating Tamara had first enrolled for outpatient treatment at Kedren Health in August 2017, her most recent visit occurred on March 26, 2018, and her next scheduled appointment was on April 27, 2018. Sindell wrote Tamara remained medication compliant and had learned to express her emotions with less agitation. Sindell recommended continued therapy, medication support and case management services.

At the April 5, 2018 hearing the court granted the Department discretion to liberalize Tamara's visitation, set Tamara's section 388 petition for a contested hearing, ordered the Department to file a written response to the petition prior to the contested hearing on Tamara's section 388 petition and continued the selection and implementation hearing to October 4, 2018.

b. *The Department's written response to Tamara's section 388 petition*

In its May 15, 2018 written response to Tamara's section 388 petition, the Department recommended the court deny Tamara's petition. According to the Department, Sindell told social worker Akeisha Davis that she was so concerned about

Tamara's medication usage and inability to handle stress that she had recently initiated a police welfare check. The Department also expressed concern that Tamara's therapy sessions with Sindell were too infrequent and that Tamara's contact with Sindell had been primarily by telephone. In addition, the Department wrote, Tamara had appeared tired and lethargic during two of her December 2017 visits with S.J. During one of those visits Tamara told S.J. she was stressed and feared she would have to move out of state or rent S.J.'s room, information that had upset S.J. (Tamara ceased such discussions after the Department told her they were inappropriate and upset S.J.) The Department also reported S.J. had expressed fear of returning to Tamara's custody, although she wished to retain a relationship with her mother.

According to the Department, in January 2018 Tamara reported she had been in a car accident and needed to cancel visits until she felt better. As a result, no visits occurred for several months. On April 16, 2018 Tamara did not attend a scheduled visit with S.J. Tamara maintained she had texted the monitor to let her know she would need to cancel because her neck hurt, but the monitor told the Department she had not received any message. On April 18, 2018 Davis attempted to speak with Tamara by telephone, but Tamara did not sound coherent. Davis believed Tamara was under the influence of drugs and directed her to report for an on-demand drug test that day. Tamara tested positive for opiates, hydrocodone, at 13,305 mg/ml. Tamara told the Department she had been taking prescribed opiate medication for pain following her car accident.

*c. The contested section 388 hearing*

The Department submitted on the reports and did not call any witnesses at the contested section 388 hearing, which began on July 9, 2018 and continued to the next day. Sindell testified in support of Tamara's petition, initially disputing some of the statements Davis had attributed to her in the Department's written response to Tamara's petition. In particular, Sindell did not recall telling Davis she had concerns about Tamara's medication or that she had recently initiated a police welfare check. The welfare check Sindell recalled prompting had occurred in October 2017. However, when pressed on cross-examination by S.J.'s counsel, Sindell refused to state with certainty that she had not initiated a welfare check more recently.

Sindell testified she had a very busy practice and met with Tamara once a month. When Tamara needed additional support, Sindell encouraged her to call; and Sindell would speak with her on the telephone. Sindell did not bring any notes with her to the hearing and was unable to recall several aspects of her meetings with Tamara, including the last time she spoke with Tamara, either in person or on the telephone, or the nature or quantity of those telephone sessions. Sindell believed Tamara's emotional stability had improved in recent months, a conclusion she based on Tamara's own assurances she had employed deep breathing exercises to relax, enlisted support from others when needed and had learned to pause before reacting. Sindell acknowledged she had been unaware of Tamara's prescribed opiate use until she was informed of the toxicology results and had not discussed Tamara's opiate use with the primary care physician who had prescribed the medication.

The Department and S.J.'s counsel urged the court to deny Tamara's section 388 petition. Both expressed concern about Tamara's substantially elevated hydrocodone levels, which they argued were far greater than her prescription would account for, and emphasized Tamara's evident lethargy during visits with S.J. and incoherent speech when talking with Davis in April 2018.<sup>5</sup> Both the Department and S.J. argued Tamara needed to further address her own recovery before any modification of the court's prior order was warranted.

The court denied Tamara's petition to modify its prior order. Citing Tamara's opiate use and lethargy during her visits, as well as her impaired judgment in discussing her physical, emotional and financial burdens with her then nine-year-old child, the court found Tamara had not carried her burden to demonstrate the concerns that had led to the assumption of jurisdiction had been ameliorated or to show that further reunification services were in S.J.'s best interests.<sup>6</sup>

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<sup>5</sup> A note from Carl Feld, M.D., which Tamara had submitted with her section 388 petition, is not included in the appellate record. In the transcript of the hearing, the court described the letter as stating Dr. Feld had prescribed Tamara 5/325 mg hydrocodone for pain, which Tamara used from January 2, 2018 through May 16, 2018. The Department, which characterized the letter as vague, argued that Tamara's toxicology test results indicated opiate usage far greater than her prescription allowed.

<sup>6</sup> After the court allowed Tamara to speak briefly on her own behalf following denial of her motion, Tamara insisted she had not abused, and no longer even used, opiates. She lamented that she had been doing her very best and regularly participating in programs and therapy, but that, notwithstanding all those



## DISCUSSION

### 1. *Governing Law and Standard of Review*

Section 388 provides for modification of juvenile court orders when the moving party (1) presents new evidence or a change of circumstance and (2) demonstrates modification of the previous order is in the child's best interest.<sup>7</sup> (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see Cal. Rules of Court, rule 5.570(e); *In re Zacharia D.* (1993) 6 Cal.4th 435, 455 [“[s]ection 388 provides the “escape mechanism” that . . . must be built into the process to allow the court to consider new information”].) When, as here, a section 388 petition is filed after family reunification services have been terminated, the juvenile court's overriding concern is the child's best interest. (*Stephanie M.*, at p. 317.) The parent's interests in the care, custody and companionship of the child are no longer paramount; and the focus shifts to the needs of the child for permanency and

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efforts, her parental rights were still at risk of being terminated. The court complimented Tamara on her efforts and urged her to continue with her therapy, explaining it would assist her and S.J. The court also reiterated there was no plan to terminate Tamara's parental rights. Legal guardianship with Tamara's friend and mentor, not adoption, had been identified as S.J.'s permanent plan.

<sup>7</sup> Section 388, subdivision (a)(1), provides, “Any parent or other person having an interest in a child who is a dependent of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.”

stability. (*Ibid.*; *In re Vincent M.* (2008) 161 Cal.App.4th 943, 960.)

“[B]est interests is a complex idea” that requires consideration of a variety of factors. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531; see *In re Jacob P.* (2007) 157 Cal.App.4th 819, 832-833.) In determining whether a section 388 petitioner has made the requisite showing, the juvenile court may consider the entire factual and procedural history of the case, including factors such as the seriousness of the reason leading to the child’s removal, the reason the problem was not resolved, the passage of time since the child’s removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

If the juvenile court has ruled the parent failed to carry her initial burden to demonstrate new evidence or changed circumstances, the first step of the analysis, the question for the reviewing court is whether that finding is erroneous as a matter of law. (See *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 [where the issue on appeal turns on a failure of proof at trial, “the question for a reviewing court [becomes] “whether the evidence compels a finding in favor of the appellant as a matter of law””]; *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1156 [same].) We review the court’s best interest determination, the second step, for abuse of discretion and may disturb the exercise of that discretion only in the rare case when the court has made an arbitrary or irrational determination. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the juvenile court. (*Ibid.*) We ask only whether the juvenile court abused its discretion with respect to the order it actually made. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

2. *The Trial Court Did Not Err in Denying Tamara's Petition for Reinstatement of Reunification Services*

Relying on Sindell's testimony, Tamara contends she adequately demonstrated a significant change in circumstances, her improved mental health, to support her section 388 petition: Her participation in individual counseling, which the court in December 2017 deemed too recent to inspire confidence in Tamara's long-term emotional stability, had continued uninterrupted, even despite a January 2018 car accident.

Contrary to Tamara's characterization of the evidence, however, Sindell's testimony was not particularly strong. Sindell was unable to recall with any certainty the last time she had seen Tamara; the number, nature or circumstances of their in-person or telephonic sessions; whether additional welfare checks had been undertaken; or whether Tamara's current opiate use had affected her emotional stability. While Tamara's regular participation in counseling was undisputed, it was by no means clear from the evidence that Tamara had demonstrated the kind of significant improvement to carry her burden as a matter of law. (See *In re Alayah J.* (2017) 9 Cal.App.5th 469, 482 [a parent seeking relief under section 388 must show changed, not changing, circumstances]; *In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 615 [the change in circumstances must be sufficiently

significant that it “requires a setting aside or modification of the challenged prior order”].)

The court also found reinstatement of reunification services at this stage was not in S.J.’s best interests. As the court and S.J.’s counsel observed, Tamara appeared lethargic during visits with S.J., spoke incoherently and appeared under the influence of drugs during a conversation with Davis, used poor judgment in sharing her physical and financial stressors with her nine-year-old child and had to cut short visits with S.J. due to her fatigue. Both the Department’s and S.J.’s counsel persuasively argued the record demonstrated that Tamara needed more time to address her own recovery before she could adequately address S.J.’s numerous special needs.

Tamara contends the court’s focus on her allegedly high opiate levels in the toxicology report was improper because no expert testimony was presented that those levels were inconsistent with her prescribed dosage, let alone that they were indicative of opiate abuse. However, expert testimony that Tamara was abusing opiates was not necessary to find that her use of opiates, whether in accordance with her prescription or not, interfered with her ability to parent S.J. As the juvenile court observed, while “there is nothing illegal about taking prescription medication, just as with alcohol or other legal substances, it can impair a person’s ability to engage in parenting, and there [wa]s evidence that mother has appeared at visits in a sleepy and lethargic condition.”

Tamara also emphasizes that social worker reports describe her as being lethargic in December 2017, before she began taking prescribed opiates for her January 2018 car accident. Accordingly, she argues, it was improper for the court

to attribute that behavior to opiate use. However, whether opiate-induced or not, it was clear Tamara was suffering from extreme emotional stress in December 2017, as she told S.J., and her condition was exacerbated by her car accident. She had not been able to visit S.J. for several months and exhibited such concerning behavior in April 2018 that the Department ordered her to drug test. Although the court credited Sindell's testimony that Tamara had continued with her monthly mental health therapy despite the car accident and had incorporated new skills to manage stress in recent months, Sindell did not provide any insight into the effect of Tamara's opiate use on her mental state, much less her ability to parent S.J. While complimenting Tamara's therapeutic efforts, the court found that Tamara's improvement was still too tenuous and that reinstatement of reunification services would not be in S.J.'s best interests. On this record, that finding, neither irrational nor arbitrary, was not an abuse of the court's broad discretion.<sup>8</sup>

### **DISPOSITION**

The court's July 10, 2018 order denying Tamara's section 388 petition to reinstate reunification services is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

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<sup>8</sup> Tamara does not challenge on appeal the court's ruling denying her request for unmonitored visitation. Accordingly, we do not consider that aspect of the court's order.